U.S. Department of Labor

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Issue Date: 16 February 2006

Case Nos.: 2005-LHC-1236
2005-LHC-2405

OWCP Nos.: 06-157517
06-141076

IN THE MATTER OF

ALBERT L. MARTIN,
Claimant

vs.

NORTHROP GRUMMAN SHIP SYSTEMS, INC.,
Employer

APPEARANCES:

ARTHUR J. BREWSTER, ESQ.,
On Behalf of the Claimant

PAUL B. HOWELL, ESQ.,
On Behalf of the Employer/Carrier

BEFORE: RICHARD D. MILLS
Administrative Law Judge

DECISION AND ORDER—AWARDING BENEFITS

This proceeding involves a claim for benefits under the Longshore and Harbor Workers' Compensation Act, as amended, 33 U.S.C. §901 et seq., (the "Act" or "LHWCA"). The claim was originally filed by Albert L. Martin, "Claimant," against the Northrop Grumman Ship Systems, Inc. ("Ingalls"), "Employer," for injuries he sustained in 1991 and 1993. In the original decision, the ALJ found that Claimant suffered a back injury on November 8, 1993, while in the course and scope of his employment with Ingalls. See Martin v. Ingalls Shipbuilding, Inc., Case No. 98-LHC-1939 (March 9, 1999

ALJ Price). Judge Price ordered Ingalls to pay Claimant temporary total disability compensation, based on an average weekly wage of $524.25, from November 23, 1993 until January 30, 1995 and temporary partial disability compensation at a weekly rate of $236.16 from January 30, 1997 to June 5, 1996 and from July 18, 1996 to September 11, 1996. Id. He ordered Ingalls to pay Claimant permanent partial disability compensation at weekly a rate of $212.16 from January 30, 1997 until he received lumbar surgery and temporary total disability after the lumbar surgery and continuing until he reached maximum medical improvement. Id. Judge Price also ordered that Ingalls pay for all reasonable and necessary medical treatment related to Claimant's work-injury. Id.

Subsequent to the surgery, this Court adjudicated a §22 modification proceeding, concerning whether or not Claimant had a continuing disability following the surgery. See Martin v. Northrop Grumman Ship Systems, Inc., Case Nos. 03-LHC-100 and 03-LHC-101 (Nov. 19, 2003 ALJ Mills). Claimant underwent lumbar surgery on January 16, 2000, at which time Ingalls stopped paying partial disability compensation and paid temporary total disability compensation through April 11, 2000, the date on which Claimant reached maximum medical improvement. Id. The Court found that Claimant had no continuing disability, based on Dr. Brent's opinion that Claimant had no restrictions following the surgery and modified the original judgment to reflect that Claimant's entitlement to disability benefits was terminated beginning April 11, 2000. Id. The Order was affirmed by the Benefits Review Board on November 12, 2004. EX-3.

Claimant initiated the present proceeding, seeking modification on the basis that his back condition worsened entitling him to further disability compensation. EX-4. A hearing in this matter was to be held on September 9, 2005 in Metairie, Louisiana, but the parties waived their right to a hearing, having reached agreement on all issues except the applicability of Second Injury Fund Relief.

An Order Setting Briefing Schedule in regards to the issue of Second Injury Fund Relief was issued, and Employer and the Director filed briefs. In addition, Claimant and Employer filed a Joint Stipulation of Fact and Law supported by Employer's Exhibits ("EX") 1-25, hereby admitted into evidence. Claimant filed a Petition for Attorney's Fees. The Court finds the record sufficient to support the following stipulations:

1. The parties agree that an Order on the basis of this stipulation shall have the same force and effect as an Order made after a full hearing.

2. That the documents attached to this stipulation as Exhibit "A" substantiate the stipulation and represent the evidence to be considered by the administrative law judge on the 8(f) issue.

3. That the parties waive any further procedural steps before the administrative law judge other than the judge's resolution of the Second Injury Fund issue.

4. That the parties waive any right to challenge or contest the validity of the Order entered into in accordance with this agreement.

5. That the claimant, Albert L. Martin, at all times pertinent hereto was subject to the jurisdiction of the Longshore and Harbor Workers' Compensation Act, since he was employed as an electrician in the construction of naval vessels at Northrop Grumman Ship Systems, Inc. which adjoins the navigable waters of the Pascagoula River and the Gulf of Mexico.

6. That on or about September 4, 1991, while in the course and scope of his employment the claimant injured his shoulder and neck.

7. That the claimant's average weekly wage for this injury is $268.23.

8. That the claimant was temporarily and totally disabled as a result of the injury of September 4, 1991, on October 1, 1991, and from November 4, 1991, through December 1, 1991, at which time he reached maximum medical improvement.

9. That following the injury of September 4, 1991, claimant returned to work for employer with no loss of wage earning capacity on December 2, 1991.

10. That the claimant sustained a second injury on November 19, 1993, when he injured his back.

11. That the claimant's average weekly wage at the time of the injury of November 19, 1993, was $524.25.

12. That as a result of the injury of November 19, 1993, claimant was temporarily and totally disabled from November 23, 1993, through January 30, 1995, and from January 17, 2000, through April 11, 2000.

13. That as a result of the injury of November 19, 1993, the claimant was temporarily and partially disabled with a wage earning capacity of $170.00 from January 31, 1995, through June 5, 1996; and from July 18, 1996, through September 11, 1996.

14. That as a result of the injury of November 19, 1993, claimant was temporarily and partially disabled with a wage earning capacity of $206.00 from January 30, 1997, through January 16, 2000.

15. Claimant reached maximum medical improvement for the injury of November 19, 1993, on April 11, 2000.

16. That as a result of the injury of November 19, 1993, claimant became permanently and partially disabled with a wage earning capacity of $206.00 from June 19, 2004, to the present and continuing, which would entitle the claimant to $212.16 per week from June 19, 2004, to the present and continuing.

17. That the Employer will remain responsible for Claimant's past and future causally related medical expenses pursuant to §7 of the Act, including the medical expenses of Dr. Mark Caylor.

18. That the parties agree that counsel for claimant, Arthur J. Brewster, shall be entitled to a reasonable and necessary attorney fee in the amount of $7,500.00.

19. That no penalties or interest are due.

20. That the employer will be entitled to a credit for any compensation heretofore paid for these injuries as against any liability for compensation owed in this matter.

21. That both parties agree that the sole issue left for resolution by the administrative law judge is the applicability of the Second Injury Fund and that issue may be resolved based upon these stipulations and the documentary evidence attached which supports the stipulations and the employer's Second Injury Fund defense.

SUMMARY OF THE EVIDENCE

Albert L. Martin, the claimant in this case is 49 years old. At the time of his initial injury on September 4, 1991, he was employed at Northrop Grumman Ship Systems, Inc., formerly Ingalls, as a tack and weld electrician. On that date, Claimant fell from a ladder. He came under the care of Dr. William Giles and was initially restricted from work. An MRI performed on November 19, 1991 indicated degenerative spurring with impingement at C5-6 and C6-7, and an EMG/NCV study was mildly abnormal. EX-13. Approximately two months after the injury, he was released to return to work with no restrictions. EX-1, p. 5.

Claimant sustained a second injury on November 19, 1993, when he suffered back pain while climbing a ladder and welding. EX-1, p. 5. He initially came under the care of Dr. Dominique Cannella, who performed a laminotomy and diskectomy at L3-4 on February 17, 1994. Dr. Cannella diagnosed post-laminectomy type syndrome in January

1995. EX-1, p. 8. In May 1995, Dr. Cannella referred Claimant to Dr. Bernardo, as he was closing his practice. Dr. Bernardo treated Claimant conservatively from July 1995 through November 1995, at which point Claimant became dissatisfied with his care. EX-1, p. 10.

Claimant came under the care of Dr. John J. McCloskey on July 16, 1996. EX 25, p. 12. Claimant underwent a myelogram on July 19, 1996, which showed a probable herniation at L3-4. EX-25, p. 19. Claimant eventually came under the care of Dr. Charles R. Brent in Hattiesburg, Mississippi. He first saw Claimant on June 9, 1998. He diagnosed a recurrent right L3-4 disc herniation, cervical spondylosis of the left at C5-6, and thorocolumbar spondylosis on the left at T12 through Ll. EX 1, p. 13. He performed cervical surgery on October 6, 1999, and low back surgery on January 17, 2000. Dr. Brent released Claimant at maximum medical improvement on April 11, 2000, with 21% impairment to the whole body and no restrictions. EX-1, p. 13. Claimant returned to work and was employed by Pall Life, earning slightly less than he earned at Northrop Grumman. EX-1, p. 7.

On August 8, 2003, Claimant came under the care of Dr. Eric Hasemeier, who recommended pain management and physical therapy for ongoing low back pain. EX-15, pp. 1-2. In March of 2004, Dr. Hasemeier noted that the claimant was having cervical complaints in addition to low back complaints. EX-15, p. 6a. The MRI scan of March 23, 2004, indicated stenosis at C2-3 and C7-T1, with a possible disc fragment at C5-6. EX-14, p. 4. Accordingly, Dr. Hasemeier referred Claimant to an orthopaedic surgeon and placed the claimant on light duty. EX 15, pp. 7-8. On March 31, 2004, Claimant was evaluated by Dr. Craig Cartia. EX-16. Dr. Cartia noted that the claimant was having ongoing chronic problems throughout the entire spine. Dr. Cartia prescribed neuroforaminal and facet joint injections and recommended light duty. EX-16, pp. 3-4.

On April 27, 2004, Claimant came under the care of Dr. Mark Caylor. EX-17. Dr. Caylor noted degenerative disc disease in both the lumbar and cervical spine with a possible fragment at C5-6. EX-17, p. 4. On June 14, 2004, Dr. Caylor recommended against significant heavy lifting or manual type work and limited Claimant to light duty. EX-17, p. 6. Claimant thereafter resigned from Pall Corp., effective June 18, 2004, and he has not worked since. EX-18, pp. 31-32. However, vocational consultant Maria Halpin reported various available light duty jobs suitable for Claimant, given the opinions and restrictions of Drs. Hasemeier, Cartia, and Caylor. EX-22.

On January 25, 2005, Claimant returned to Dr. Brent. EX-20, p. 14. Dr. Brent noted that Claimant now exhibited significant compromise of the spinal canal at C4-5 due to spondylitic changes. EX-20, p. 14. The closed MRI scan indicated a metal artifact at C3-4, a prominent disc protrusion at T11-12, a bulge at L2-3, and encroachment at L3-4 and L4-5. EX-20, pp. 16-21. Dr. Brent concluded that the MRI scans showed solid fusions at C3-4 and C5-6, with cervical spondylosis at multiple levels, most pronounced

on the right at C4-5. He also found evidence of thoracic spinal stenosis at T10-11, and a right L2-3 far lateral disc herniation. EX-20, p. 22. Dr. Brent noted that Claimant's primary complaints were on the opposite side of his pathology in both the cervical and lumbar area. He recommended against further surgery due to Claimant's failure to improve after prior surgeries. EX-20, p. 23. He concluded that Claimant was at maximum medical improvement with 40 percent impairment of the whole person and that he did not expect Claimant to return to work in any capacity. EX-20, p. 23.

In Dr. Brent's deposition of July 12, 2005, he stated that Claimant had a change of conditions exhibiting new findings in both the neck and back since he had released him to full duty in April 2000. He opined that the increased impairment rating, from 21 percent to 40 percent, was evidence of significant degenerative disc disease, rather than the result of a simple injury. EX-21, p.40. He testified that the increased impairment rating was unrelated to the 1991 or 1993 injuries. EX-21, pp. 32, 42-43. He testified that Claimant's pre-existing injury of September 4, 1991 combined with and contributed to his injury of November 19, 1993, to make him materially and substantially more disabled than he would have been as a result of the injury of November 19, 1993 alone. EX-21, p. 45.

Dr. McCloskey was provided the records of Dr. Giles' treatment of the September 4, 1991 injury. After reviewing the records, he opined that Claimant's neck problems date from the 1991 accident and his back problems date from the 1993 accident. He stated that, given Claimant's anterior cervical diskectomy and fusion at C4-5 and C5-6 in 1999, he was more disabled as a result of the 1991 neck injury than he would have been had he only had the 1993 back injury alone. EX-25, p. 36. Dr. McCloskey explained that the 1991 neck injury would require additional restrictions that Claimant not vertically climb or work overhead, which would not be necessary if he had a back injury alone. EX-25, p. 36.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

The following findings of fact and conclusions of law are based upon the Court's observations of the credibility of the witnesses, and upon an analysis of the medical records, applicable regulations, statutes, case law, and arguments of the parties. As the trier of fact, this Court may accept or reject all or any part of the evidence, including that of expert medical witnesses, and rely on its own judgment to resolve factual disputes and conflicts in the evidence. See Todd Shipyards v. Donovan, 300 F.2d 741 (5th Cir. 1962). In evaluating the evidence and reaching a decision, this Court applies the principle, enunciated in Director, OWCP v. Greenwich Collieries, 114 S.Ct. 2251 (1994), that the

burden of persuasion is with the proponent of the rule. The "true doubt" rule, which resolves conflicts in favor of the claimant when the evidence is balanced, will not be applied, because it violates §556(d) of the Administrative Procedure Act. See Director, OWCP v. Greenwich Collieries, 512 U.S. 267, 281, 114 S.Ct. 2251, 2259, 129 L.Ed. 2d 221 (1994).

JURISDICTION AND COVERAGE

This dispute is before the Court pursuant to 33 U.S.C. §919(d) and 5 U.S.C. §554, by way of 20 C.F.R. §§702.331 and 702.332. See Main v. Brady-Hamilton Stevedore Co., 18 BRBS 129, 131 (1986).

In order to demonstrate coverage under the Longshore and Harbor Workers' Compensation Act, a worker must satisfy both a situs and a status test. Herb's Welding, Inc. v. Gray, 470 U.S. 414, 415-16, 105 S.Ct. 1421, 1423, 84 L.Ed. 2d 406 (1985); P.C. Pfeiffer Co. v. Ford, 444 U.S. 69, 73, 100 S.Ct. 328, 332, 62 L.Ed. 2d 225 (1979). The situs test limits the geographic coverage of the LHWCA, while the status test is an occupational concept that focuses on the nature of the worker's activities. Bienvenu v. Texaco, Inc., 164 F.3d 901, 904 (5th Cir. 1999); P.C. Pfeiffer Co., 444 U.S. at 78, 100 S.Ct. at 334-35, 62 L.Ed.2d 225.

The situs test originates from §3(a) of the LHWCA, 33 U.S.C. §903(a), and the status test originates from §2(3), 33 U.S.C. §902(3). See P.C. Pfeiffer Co., 444 U.S. at 73-74, 100 S.Ct. at 332, 62 L.Ed. 2d 225. With respect to the situs requirement, §3(a) states that the LHWCA provides compensation for a worker whose "disability or death results from an injury occurring upon the navigable waters of the United States (including any adjoining pier, wharf, dry dock, terminal, building way, marine railway, or other adjoining area customarily used by an employer in loading, unloading, repairing or building a vessel)." Id. With respect to the status requirement, §2(3) defines an "employee" as "any person engaged in longshoring operations, and any harborworker including a ship repairman, shipbuilder, and shipbreaker . . . ." Id. To be eligible for compensation, a person must be an employee as defined by §2(3) who sustains an injury on the situs defined by §3(a). Id.

In this case, the parties do not contest jurisdiction under the Act. At the time of his alleged injury, Claimant was employed as an electrician in the construction of naval vessels at Northrop Grumman Ship Systems, Inc., which adjoins the navigable waters of the Pascagoula River and the Gulf of Mexico. Joint Stipulations ¶5. Therefore, the Court finds that jurisdiction under the Act is proper for this case.

NATURE AND EXTENT OF SCHEDULED DISABILITY

Disability under the Act means, "incapacity as a result of injury to earn wages which the employee was receiving at the time of injury at the same or any other employment." 33 U.S.C. §902(10). Therefore, in order for a claimant to receive a disability award, he must have an economic loss coupled with a physical or psychological impairment. Sproull v. Stevedoring Servs. of America, 25 BRBS 100, 110 (1991). Under this standard, an employee will be found to have no loss of wage earning capacity, a total loss, or a partial loss. The burden of proving the nature and extent of disability rests with the claimant. Trask v. Lockheed Shipbuilding Constr. Co., 17 BRBS 56, 59 (1980).

The nature of a disability can be either permanent or temporary. A disability classified as permanent is one that has continued for a lengthy period of time and appears to be of lasting or indefinite duration, as distinguished from one in which recovery merely awaits a normal healing period. SGS Control Servs. v. Director, OWCP, 86 F.3d 438, 444 (5th Cir. 1996). A claimant's disability is permanent in nature if he has any residual disability after reaching maximum medical improvement. Trask, 17 BRBS at 60. Any disability suffered by the claimant before reaching maximum medical improvement is considered temporary in nature. Berkstresser v. Washington Metro. Area Transit Auth., 16 BRBS 231 (1984); SGS Control Servs., 86 F.3d at 443.

The date of maximum medical improvement is the traditional method of determining whether a disability is permanent or temporary in nature. See Turney v. Bethlehem Steel Corp., 17 BRBS 232, 235 n.5, (1985); Trask, 17 BRBS at 60; Stevens v. Lockheed Shipbuilding Co., 22 BRBS 155, 157 (1989). The date of maximum medical improvement is the date on which the employee has received the maximum benefit of medical treatment such that his condition will not improve. This date is primarily a medical determination. Manson v. Bender Welding & Mach. Co., 16 BRBS 307, 309 (1984). It is also a question of fact that is based upon the medical evidence of record, regardless of economic or vocational consideration. Louisiana Ins. Guar. Ass'n. v. Abbott, 40 F.3d 122, 29 BRBS 22 (CRT) (5th Cir. 1994); Ballesteros v. Willamette Western Corp., 20 BRBS 184, 186 (1988); Williams v. General Dynamic Corp., 10 BRBS 915 (1979).

In this case, the parties stipulated that Claimant's back injury reached maximum medical improvement on April 11, 2000.[1] Joint Stipulations ¶15. This stipulation was accepted in Martin v. Northrop Grumman Ship Systems, Inc., Case Nos. 03-LHC-100 and 03-LHC-101, and is supported by the opinion of Dr. Brent. See Id.

The extent of disability can be either partial or total. To establish a *prima facie* case of total disability, the claimant must show that he cannot return to his regular or usual employment due to his work related injury. See Manigault v. Stevens Shipping Co., 22 BRBS 332 (1989); Harrison v. Todd Pac. Shipyards Corp., 21 BRBS 339 (1988). Total disability becomes partial on the earliest date that the employer establishes suitable alternative employment. Rinaldi v. General Shipbuilding Co., 25 BRBS 128 (1991). To establish suitable alternative employment, an employer must show the existence of realistically available job opportunities within the geographical area where the employee resides which he is capable of performing, considering his age, education, work experience, and physical restrictions, and which he could secure if he diligently tried. New Orleans Stevedores v. Turner, 661 F.2d 1031 (5th Cir. 1981); McCabe v. Sun Shipbuilding & Dry Dock Co., 602 F.2d 59 (3d Cir. 1979). For the job opportunities to be realistic, however, the employer must establish their precise nature, terms, and availability. Thompson v. Lockheed Shipbuilding & Constr. Co., 21 BRBS 94, 97 (1988). A failure to prove suitable alternative employment results in a finding of total disability. Manigault v. Stevens Shipping Co., 22 BRBS 332 (1989). If the employer meets its burden and shows suitable alternative employment, the burden shifts back to the claimant to prove a diligent search and willingness to work. See Williams v. Halter Marine Serv., 19 BRBS 248 (1987). If the employee does not prove this, then at the most, his disability is partial and not total. See 33 U.S.C. §908(c); Southern v. Farmers Export Co., 17 BRBS 64 (1985).

The parties have stipulated that Claimant became permanently partially disabled, with a wage earning capacity of $206.00, from June 19, 2004 to the present and continuing. Joint Stipulations ¶16. This stipulation is supported by evidence that Claimant resigned from his employment at Pall on June 18, 2004 due to Dr. Caylor's restrictions of light duty work. EX-18, p. 28-32. The labor market survey of Maria Halpin indicated suitable light duty positions available to Claimant, with wages ranging from $5.50 to $6.50 per hour. EX-22. The labor market survey supports the stipulation that Claimant's wage earning capacity is $206.00 per week.

[1] Joint Stipulations ¶¶ 6 – 15 reflect the nature and extent of Claimant's disability previously adjudicated in Martin v. Ingalls Shipbuilding, Inc., Case No. 98-LHC-1939 (March 9, 1999 ALJ Price) and Martin v. Northrop Grumman Ship Systems, Inc., Case Nos. 03-LHC-100 and 03-LHC-101 (Nov. 19, 2003 ALJ Mills).

REASONABLE AND NECESSARY MEDICAL EXPENSES

Section 7(a) of the Act provides that:

(a) The employer shall furnish such medical, surgical, and other attendance or treatment, nurse and hospital service, medicine, crutches, and apparatus, for such period as the nature of the injury or the process or recovery may require. 33 U.S.C. §907(a).

In order for a medical expense to be assessed against the employer, the expense must be both reasonable and necessary. Parnell v. Capitol Hill Masonry, 11 BRBS 532, 539 (1979). Medical care must be appropriate for the injury. 20 C.F.R. §702.402. A claimant has established a prima facie case for compensable medical treatment where a qualified physician indicates treatment was necessary for a work-related condition. Turner v. Chesapeake & Potomac Tel. Co., 16 BRBS 255, 257-258 (1984). The claimant must establish that the medical expenses are related to the compensable injury. See Pardee v. Army & Air Force Exch. Serv., 13 BRBS 1130 (1981); See Suppa v. Lehigh Valley R.R. Co., 13 BRBS 374 (1981). The employer is liable for all medical expenses which are the natural and unavoidable result of the work injury, and not due to an intervening cause. See Atlantic Marine v. Bruce, 661 F.2d 898, 14 BRBS 63 (5th Cir. 1981), aff'g 12 BRBS 65 (1980).

The parties have stipulated that Employer will remain responsible for Claimant's past and future causally related medical expenses pursuant to §7 of the Act, including the medical expenses of Dr. Mark Caylor. Joint Stipulations ¶17. This stipulation is supported by the record and is accepted by the Court.

SECTION 8(F) SPECIAL FUND RELIEF

Section 8(f) shifts part of the liability to pay compensation for permanent disability or death from an employer to the Special Fund established in §44 of the Act when the disability or death is not due solely to the injury that is the subject of the claim. See Wiggins v. Newport News Shipbuilding & Dry Dock Co., 31 BRBS 142, 146 (1997); 33 U.S.C. §908 (f) and §944. To be entitled to compensation under §8(f) when the employee is permanently totally disabled, the employer must establish that the employee seeking compensation had: (1) an existing permanent partial disability before the employment injury; (2) that the permanent partial disability was manifest to the employer; and (3) that the current disability is not due solely to the employment injury. Two R Drilling Co. v. Director, OWCP, 894 F.2d 748, 750, 23 BRBS 34, 35 (CRT) (5th Cir. 1990); Director, OWCP v. Campbell Industries Inc., 14 BRBS 974, 976 (9th Cir. 1982), cert. denied, 459 U.S. 1104, 113 S.Ct. 726, 74 L.Ed. 2d 951 (1983); 33 U.S.C. §908(f)(1).

With respect to the requirement of an existing permanent partial disability, the term "disability" in §8(f) can be an economic disability under §8(c)(21) or one of the scheduled losses specified in §8(c)(1)-(20), but it is not limited to those cases alone. C & P Tel. Co. v. Director, OWCP, 564 F.2d 503, 513 (D.C. Cir. 1977). "Disability" under §8(f) is necessarily of sufficient breadth to encompass those cases wherein the employee had such a serious physical disability in fact that a cautious employer would have been motivated to discharge the handicapped employee because of a greatly increased risk of an employment-related accident and compensation liability. Id.

The evidence in this case does not establish that Claimant had an existing permanent partial disability prior to his November 19, 1993 work-related back injury. Employer argues that Claimant's 1991 neck injury is a disability that would cause a cautious employer to dismiss the claimant due to increased risk of compensation liability. Employer asserts that the MRI, which showed degenerative spurring with impingement at C5-6 and C6-9, and the mildly abnormal EMG reveal objective findings of a serious disability from the 1991 injury.

This Court disagrees and finds the evidence of record insufficient to establish a permanent partial disability. The record contains evidence of only three visits to Dr. Giles and evidence that Dr. Giles released Claimant back to work without restrictions after approximately two months. EX-13. Employer's argument fails because the mere fact of a past injury does not establish disability. There must be a serious, lasting physical problem. See Lockheed Shipbuilding v. Director, OWCP, 951 F.2d 1143, 1145-46, 25 BRBS 85 (CRT) (9th Cir. 1991); Director, OWCP v. Campbell Indus., 770 F.2d 1220, 1222, 17 BRBS 146, 149 (CRT) (D.C. Cir. 1985). The medical records establish that Claimant's prior injury was not assigned an impairment rating and that he was released to work with no restrictions. Based on the foregoing, the Court finds that the injury does not amount to a serious, lasting physical disability that would cause a cautious employer to dismiss the claimant due to increased risk of compensation liability. Thus, Employer is not entitled to Section 8(f) relief.

Additionally, Employer has not met the requirement under §8(f) of establishing that Claimant's current disability is not due solely to his November 19, 1993 employment injury. When the employee is permanently partially disabled, the employer must show that the current permanent partial disability is "materially and substantially greater than that which would have resulted from the subsequent injury alone." Two R. Drilling Co. v. Director, OWCP, 894 F.2d 748, 750 (5th Cir. 1990). To meet this prong, the Fifth Circuit requires that the employer present evidence of the type and extent of the disability the claimant would suffer if not previously disabled when injured. Director, OWCP v. Ingalls Shipbuilding, Inc., 125 F.3d 303, 307 (5th Cir. 1997). The Court finds that Employer has not offered proof of the extent of Claimant's permanent partial disability had the pre-existing injury never occurred. Employer submits only the conclusory opinions of Drs. Brent and McCloskey that Claimant's 1991 injury combined with the

effects of the 1993 injury to render him materially and substantially more disabled than he would have been as a result of the 1993 injury alone. EX-21, p. 45; EX-25, p. 36. This statement alone, unsupported by medical analysis or quantification of Claimant's current permanent partial disability in the absence of the prior injury, is insufficient to support the conclusion that Claimant's disability is materially and substantially greater than a disability caused by the 1993 injury alone. Dr. McCloskey supported his opinion only with the fact that Claimant underwent a cervical surgery in 1999 and that a neck injury would hypothetically restrict him further than the back injury alone.[2] EX-25, p. 36. Further, while Dr. Brent indicated in his deposition that Claimant's current 40 percent impairment rating had increased from his former 21 percent impairment rating, he opined that this increase was the result of significant degenerative disc disease and not the result of any work-related injury. EX-21, p. 40. Accordingly, neither physician rendered an opinion concerning the extent of Claimant's permanent partial disability had the 1991 injury never occurred. Given the above analysis, the Court finds that Employer has not met the §8(f) requirements and is not entitled to relief under that section.

ATTORNEY'S FEES

Claimant has filed a fully supported Fee Petition and Expense Statement. The Employer has agreed to pay Claimant's attorney the sum of $7,500.00 for fully and successfully prosecuting this claim.

I find the application of Claimant's counsel to be reasonable and award an attorney's fee of $7,500.00 to Arthur J. Brewster, Esq.

Accordingly,

ORDER

It is hereby **ORDERED, ADJUDGED AND DECREED** that:

1) Employer shall pay to Claimant compensation for permanent partial disability benefits beginning June 19, 2004, to the present and continuing, based on an average weekly wage of $524.25, to be reduced by his residual wage earning capacity of $206.00.

2) Employer/Carrier shall be entitled to a credit for all payments of compensation previously made to Claimant.

[2] Yet, the record is clear that Claimant received no restrictions from his 1991 neck injury. EX-13.

3) Employer shall pay or reimburse Claimant for all reasonable and necessary past and future medical expenses, which are the result of Claimant's work-related back injury, including the medical expenses of Dr. Mark Caylor.

4) Employer shall pay Claimant's attorney, Arthur J. Brewster, Esq., an attorney's fee in the sum of $7,500.00.

5) All calculations necessary for the payment of this award are to be made by the OWCP District Director.

So ORDERED.

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RICHARD D. MILLS
Administrative Law Judge